INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	3
Statement	3
Summary of argument	8
Argument	11
I A registrant charged with violation of an order to report for induction may not challenge the validity of that order in his criminal trial when he has failed to pursue to completion the exclusive administrative procedure provided by the Selective Training and Service Act of 1940	12
II Section 10 (b) of the Selective Training and Service Act authorized the President to delegate to General Hershey, as Director of Selective Service, authority to decide appeals to the President under the Selective Service Regulations	28
Petitioner's standing to raise the question	32
The legislative background of Section 10	33
The administrative interpretation of Section 10	46
Congressional approval of the administrative construction	50
Conclusion	58
Appendix A	59
Appendix B	68
Appendix C	79
Appendix D	84
Appendix E	85

CITATIONS

Cases:	
Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288	33
Bagley v. *United States*, No. 10,574, decided June 14, 1944, opinion amended September 20, 1944 (C. C. A. 9)	25
Bayly, United States ex rel. v. *Reckord*, 51 F. Supp. 507	15
Beye, United States ex rel. v. *Downer*, 143 F. (2d) 125	15
Billings v. *Truesdell*, 321 U. S. 542	19
Bowles v. *United States*, 319 U. S. 33	11, 14, 31
Brandon, United States ex rel. v. *Downer*, 139 F. (2d) 761	15, 31
Cascone, United States ex rel. v. *Smith*, 48 F. Supp. 842	15
Chambers v. *Baltimore & Ohio R. Co.*, 207 U. S. 142	25
Cope v. *Cope*, 137 U. S. 682	54

620811—44——1

Cases—Continued. Page

Electric Company v. *Dow*, 166 U. S. 480 33
Falbo v. *United States*, 320 U. S. 549 ..... 8, 9, 14, 16, 17, 19
Franke v. *Murray*, 248 Fed. 865 13
Great Falls Manufacturing Company v. *Attorney General*, 124 U. S. 581 33
Green, Ex parte, 123 F. (2d) 862, certiorari denied, 316 U. S. 668 15
Haggar Co. v. *Helvering*, 308 U. S. 389 53
Helvering v. *New York Trust Co.*, 292 U. S. 455 54
Jordan v. *Roche*, 228 U. S. 436 54
LaCharity, United States ex rel. v. *Commanding Officer United States Army Induction Center*, 142 F. (2d) 381 ... 15
Lynn, United States ex rel. v. *Downer*, 140 F. (2d) 397, certiorari denied, 322 U. S. 756 15
McCulloch v. *Maryland*, 4 Wheat. 316 50
Reel, United States ex rel. v. *Badt*, 141 F. (2d) 845 15
Romano, Ex parte, 251 Fed. 762 13
Tung v. *United States*, 142 F. (2d) 919 21
United States v. *American Trucking Ass'ns*, 310 U. S. 534 . 46
United States v. *Bullard*, 290 Fed. 704, certiorari denied, 262 U. S. 760 13
United States v. *Freeman*, 3 How. 556 54
United States v. *Midwest Oil Company*, 236 U. S. 459 51
Wall v. *Parrot Silver and Copper Company*, 244 U. S. 407 .. 33
Yakus v. *United States*, 321 U. S. 414 ..... 18, 20
Zucker, United States ex rel. v. *Osborne*, 54 F. Supp. 984 ... 15

Statutes:

Articles of War, Sec. 2a, 41 Stat. 787, 10 U. S. C. 1473 ... 13
Selective Draft Act of 1917, Sec. 4 (50 U. S. C. App. 204) . 34
National Defense Act of 1920, Sec. 5 (b) (10 U. S. C. 34) .. 37
R. S. 1222 (10 U. S. C. 576) 31
Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. App. 301–318):
Sec. 5 (g) 59
Sec. 10 (a) 10
Sec. 10 (a) (1) 60
Sec. 10 (a) (2) 12, 30, 31, 48, 50, 61
Sec. 10 (a) (3) 12, 31, 62
Sec. 10 (b) 29, 30, 50
Sec. 11 62
Selective Training and Service Act as amended by the Act of December 5, 1943, 57 Stat. 596:
Sec. 5 (l) 52, 64
Sec. 10 (a) (2) 52, 56, 65
Sec. 10 (a) (3) 56, 66
Sec. 10 (b) 54, 67

Regulations:	Page
Army Regulations 615–360	15
Selective Service Regulations (1917):	
111–114 (a)	35
Sec. 133	13
Sec. 140	13
Proposed Selective Service Regulations:	
1932 Edition:	
Sec. 76 b. (2)	39, 40
Sec. 77 c. (1)	39, 40
Selective Service Regulations:	
First Edition:	
Vol. I	25, 48
Par. 119a	25
Vol. II	25
Second Edition:	
622.11	68
627.1	68
627.1 (b)	68
627.2	68
627.2 (b)	69
627.2 (c)	69
627.11	70
627.11 (a)	70
627.11 (a) (1)	70
627.11 (a) (2)	70
627.12	70
627.13	70
627.13 (a)	70
627.13 (b)	71
627.23	71
627.24	71
627.24 (a)	71
627.24 (b)	71
627.25	72
627.25 (a)	72
627.25 (b)	72
627.25 (c)	73
627.26	73
627.26 (a)	73
627.26 (b)	73
627.27	73
627.27 (a)	73
627.27 (b)	74
627.27 (c)	74
627.41	22, 75
627.61 (b)	75
628.1	32, 75
628.2	32, 76

Regulations—Continued.
Selective Service Regulations—Continued. Page
628.2 (a) 76
628.4 76
628.4 (a) 76
628.4 (b) 77
628.4 (c) 77
628.6 77
628.6 (1) 77
628.6 (2) 78
628.6 (3) 78
628.6 (4) 78
628.7 24, 78
Administrative Regulations:
Administrative Order No. 26 (7 F. R. 10512) 55
Executive Orders:
8545 (5 F. R. 3779) 24, 25, 48
8553 (5 F. R. 3887) 47
8559 (5 F. R. 3923) 47
8560 (5 F. R. 3923) 24, 48
8561 (5 F. R. 3935) 24
8570 (5 F. R. 4164) 24
8574 (5 F. R. 4209) 24
8619 (5 F. R. 5256) 30, 32, 48, 84
9279 (7 F. R. 10177) 55
9410 (8 F. R. 17319) 55
War Department Special Orders 231 47
Miscellaneous:
86 Cong. Rec. 8680 37
86 Cong. Rec. 8908 37
86 Cong. Rec. 10093 39
86 Cong. Rec. 10112–10115 37
86 Cong. Rec. 10927 42
86 Cong. Rec. 10932 44
86 Cong. Rec. 13578 47
86 Cong. Rec. 13973 47
87 Cong. Rec. 6519 47, 50
88 Con. Rec. 3498 50
American Selective Service (1939) 36, 37, 39, 40
34 Col. L. Rev. 1495 33
C. M. 122312, Grant (1918) (Section 2238, Digest of Opinions, Judge Advocate General, Volume 1912–1930) 14
First Report of the Director of Selective Service, 1940–1941, *Selective Service in Peacetime* 37, 38, 47
Hearings before the Committee on Military Affairs of the United States Senate, S. 4164, 76th Cong., 3d sess. 372–376 37, 41

Miscellaneous—Continued. Page

Hearings before the House Committee on Military Affairs, H. R. 7528, 77th Cong., 2d sess. pp. 79 to 124, 127 to 143, 128–129 50
H. Rep. 2903, 76th Cong., 3d sess 45
H. Rep. 2937, 76th Cong., 3d sess 46
H. Rep. 2947, 76th Cong,, 3d sess 46
H. Rep. 787, 78th Cong., 1st sess. p. 5 53
JAG 334.4, June 7, 1918 14
JAG 327.3, October 30, 1918, November 9, 1918 14
Second Report of the Director of Selective Service, 1941–42, *Selective Service in Wartime* 49, 51
Second Report of the Provost Marshal General, p. 253 36
S. 4164, 76th Cong., 3d sess 85
Senate Report No. 2002, 76th Cong., 3d sess., p. 9 ..... 41, 42
War Department Circular No. 270, December 27, 1941 14

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 192

WILLIS E. GIESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority (R. 14–19) and dissenting (R. 20–25) opinions in the United States Court of Appeals for the District of Columbia are reported at 143 F. (2d) 633. The oral opinion of the District Court appears at R. 10–11.

JURISDICTION

The judgment of the Court of Appeals was entered June 19, 1944 (R. 25). The petition for a writ of certiorari was filed June 26, 1944, and was granted October 9, 1944 (R. 26). The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

After petitioner had been classified as available for military service by his local board and by his board of appeal, the State Director of Selective Service, at petitioner's request, appealed his classification to the President. Following the usual administrative practice, pursuant to the authority vested in him by Executive Order 8619, the Director of Selective Service, General Hershey, on behalf of the President, decided the appeal, and pursuant to that affirmance of petitioner's classification he was ordered by his local board to report for induction. The questions presented are:

1. In a criminal prosecution under the Selective Training and Service Act of 1940 for disobedience of the order to report for induction, was petitioner entitled to assert as a defense that under Section 10 (a) (2) of the Act the State Director's appeal to the President should have been decided by a civilian and that the induction order was therefore invalid.

2. If such a defense could be asserted in the criminal trial, is it valid.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, as amended, and of the Selective Service Regulations, are set forth in Appendix A and Appendix B, respectively, *infra*, pp. 59–67, 68–78.

STATEMENT

On May 24, 1943, petitioner was indicted in the District Court of the United States for the District of Columbia for violation of the Selective Training and Service Act of 1940. The indictment (R. 3) alleged that on February 27, 1943, petitioner was ordered to report for induction into the armed forces of the United States on March 10, 1943, and that, in violation of his duty under the Act, he wilfully failed and neglected to do so.

With the approval of his counsel, the prosecuting attorney and the trial judge, petitioner waived a jury trial (R. 4, 6). The Government's evidence showed that the petitioner registered with his local board and filed the regular Selective Service questionnaire, and that on March 6, 1941, he was classified I–A (available for military service). On March 10, 1941, he took an appeal from that classification to his board of appeal and, while his appeal was pending, he filed the regular Selective Service form provided for registrants claiming conscientious objections. As required

by the Act (Sec. 5 (g)) and the Selective Service Regulations (Sec. 627.25), the appeal board referred the matter to the Department of Justice for an advisory recommendation in respect of petitioner's claim for exemption as a conscientious objector. A hearing was had before a hearing officer designated by the Department and that officer found on the basis of the evidence adduced at the hearing that petitioner was "obviously a sincere, active, even aggressive, pacifist," but that "there is nothing to indicate that his attitude arose because of any religious training or belief on his part." Pursuant to the recommendation of its hearing officer, the Department recommended to petitioner's board of appeal that he be continued in classification I–A. On November 5, 1942, the appeal board unanimously decided to continue petitioner in I–A. (R. 6–7.) At this juncture petitioner's right of appeal under the Act and regulations had been exhausted (see *infra,* p. 32), but he requested the State Director of Selective Service for the District of Columbia to exercise that officer's discretionary right of appeal to the President (R. 7–8). The State Director appealed to the President from the decision of the board of appeal classifying petitioner I–A and on February 19, 1943, a decision

in the following terms was rendered on that appeal (R. 8):

> Appeal No. 17449
> Appeal to the President of the United States
> Under the Provisions of the Selective Service Regulations
> District of Columbia
> Board of Appeal No. 1
> Local Board No. 2, District of Columbia
> Registrant: Willis Erle Giese
> Order No. 398
> Classification on Appeal to the President:
> Class I-A
> This, the 19th day of February 1943.
> By Authority of the President
> (S.) Lewis B. Hershey, Director

This decision was received in evidence over petitioner's objection that "it was not a proper classification under a Presidential appeal within the meaning of the Selective Service Act" (R. 8).

On February 24, 1943, petitioner was notified of the decision on the appeal to the President, and the next day "he was duly notified by Draft Board No. 2 to report for induction on March 10, 1943." Petitioner failed to report for induction on that date or at any time thereafter. (R. 8.)

The sole evidence offered by petitioner for his defense was a stipulation (R. 8–10) between the

parties that if General Hershey had been present at the trial he would have testified as follows:

> I am Director of Selective Service and was Director of Selective Service during the time involved in this appeal. I am and was at that time an officer of the United States Army on active duty, assigned to the Selective Service System, and as such detached from duty in the War Department. The entire file in the appeal to the President of Willis E. Giese, Order No. 398, Local Board No. 2, District of Columbia, taken by the State Director of Selective Service for the District of Columbia, from the 1-A classification of Board of Appeals No. 1, District of Columbia, was forwarded to the Director of Selective Service as required by Section 628.4 (c), Selective Service Regulations. The entire file was reviewed by six members of my staff who are assigned to a Board of Review established within the Selective Service System, known as the Planning Council, to consider Presidential appeals and make recommendations to me concerning them. These men made recommendations to me concerning the disposition of this appeal. Five of these men are members of the Officers Reserve Corps of the Army of the United States. The other is an officer in the United States Naval Reserve. All of these men had been ordered to active duty, but had been assigned to the Selective Service System, a civilian agency functioning under the Chairman of

> the War Manpower Commission, as authorized under Section 10 (a) (3) of the Selective Training and Service Act of 1940 as amended. The entire file, together with the recommendations of these men, was forwarded to me. On February 19, 1943, after considering the entire file and above-mentioned recommendations, and acting by authority of the President and as Director of Selective Service, I signed the decision and appeal to the President, No. 17449, retaining Willis E. Geise in Class I–A. * * * .

Petitioner rested his case upon the admission in evidence, over the objection of the Government, of this stipulation, and thereupon moved the court "to make a finding of not guilty upon the ground that the United States had failed to prove that the defendant had violated any lawful order to report for induction, in that the procedural steps necessary as a condition precedent to a lawful order to report for induction had not been followed and completed; that the evidence showed that defendant was classified as I–A (on which classification the order to report for induction was made) by an agency of appeal not composed of civilians, but of military officials in violation of the Selective Training and Service Act, as amended, and hence that defendant had never been classified on his appeal to the President or ordered to report for induction according to law" (R. 10). The trial judge denied the motion on the ground that under

the decision in *Falbo* v. *United States*, 320 U. S. 549, "this defendant cannot raise the question of alleged invalidity of the decision of the President acting through General Hershey as a defense to this indictment. But assuming, arguendo, that I am wrong about that, I am also of the opinion that the President was under no necessity to act through civilians when an appeal was taken to him". (R. 10.) The court found petitioner guilty and sentenced him to imprisonment for an indeterminate period of from three months to three years (R. 11).

Upon appeal to the United States Court of Appeals for the District of Columbia the judgment was affirmed (R. 25), the court holding that the only distinction between this case and the *Falbo* case was in the reason asserted to show the invalidity of the local board's order to report for induction and that that difference did not justify a departure from the rationale of the *Falbo* decision (R. 14–19). Chief Justice Groner dissented (R. 20–25).

SUMMARY OF ARGUMENT

Petitioner is not entitled to assert as a defense to a prosecution for failure to comply with an order to report for induction that his classification was improper because the appeal from the decision of the appeal board was decided by a military officer acting for the President, pursuant to executive order. The court below properly

held that the case was governed by the decision in *Falbo* v. *United States,* 320 U. S. 549. Indeed, the defense in that case rested in part upon an asserted denial of procedural due process, while in the present case the defense rests solely on a matter of statutory construction. In neither case is it to be supposed that Congress intended to permit challenges to the validity of orders to report for induction prior to the completion of the selective process. That process was the same at the time of petitioner's order to report as it was in the *Falbo* case. Petitioner's argument that the cases are distinguishable because his appeal was still pending within the meaning of the regulations, since it had not been decided by a civilian, is unfounded both as a matter of plain fact and as a matter of construction of the regulations, for they obviously do not contemplate that appeals decided by the Director of Selective Service pursuant to executive order under the Act shall be regarded as a nullity and preclude the subsequent issuance of an order to report for induction.

If it should, nevertheless, be held that such a defense may be made, it is submitted that petitioner is in no position to do so. He took advantage of a privilege of appeal conferred solely by the regulations, dependent on the discretion of the state director, and he should not now be heard to deny the validity of the procedure and to maintain that pursuance of it *ipso facto* rendered his classification invalid.

On the merits, petitioner's contention rests on an erroneous construction of Section 10 (a) of the Act, requiring local boards and "agencies of appeal" to be composed of civilians. The legislative history shows that what was intended was adherence to the practice under the 1917 Act, and during that period appeals to the President were decided by the Provost Marshal General. The requirement of civilian personnel applies to those branches of the selective service system which are below the presidential level—local boards, boards of appeal, and Government appeal agents. This has been the consistent administrative construction, adopted by persons instrumental in drafting the legislation and setting the machinery of administration in motion, and the construction has never been questioned by Congress. When the question was raised in litigation, Congress promptly enacted a clarifying amendment removing any doubt that the President was free to delegate his appellate functions, no less than his other functions under the Act, to a military officer. In these circumstances there would be no justification, it is submitted, for holding invalid the induction of more than 30,000 registrants whose appeals had theretofore been decided for the President by the Director of Selective Service.

ARGUMENT

Petitioner admits, and the proof at his trial showed, that he deliberately refused to comply with an order of his local draft board directing him to report for induction into the armed forces. It was his sole defense in the trial court and it is his sole contention in this Court that "he was justified in doing so because the order of his local board was based upon a I–A classification made on an appeal to the President, which appeal had been determined by officers of the United States Army and not by civilians." It is petitioner's claim "that this purported classification was a nullity and that no lawful order to report for induction had been made upon him." (Br. 2.) This contention poses for determination the questions (1) whether in his criminal trial petitioner was entitled collaterally to attack the induction order on the ground upon which he relies, and (2) if so, whether the induction order was rendered void by virtue of General Hershey's participation in the determination of the appeal to the President.[1]

[1] As we have shown, *supra*, p. 4, the appeal to the President which is the subject of petitioner's contention was taken by the State Director for the District of Columbia and not by petitioner, who had already exhausted his right of appeal under the Selective Service Regulations (see p. 32, *infra*). However, the *de novo* classification of petitioner on that appeal (see *Bowles* v. *United States*, 319 U. S. 33) furnished the basis for the induction order which petitioner disobeyed.

I

A REGISTRANT CHARGED WITH VIOLATION OF AN ORDER TO REPORT FOR INDUCTION MAY NOT CHALLENGE THE VALIDITY OF THAT ORDER IN HIS CRIMINAL TRIAL WHEN HE HAS FAILED TO PURSUE TO COMPLETION THE EXCLUSIVE ADMINISTRATIVE PROCEDURE PROVIDED BY THE SELECTIVE TRAINING AND SERVICE ACT OF 1940

Assuming, for the purpose of this point only, that petitioner's contention on the merits is sound, it is clear that it rests on a congressional determination expressed in the Selective Training and Service Act that only civilians shall participate in the appellate processes of the Selective Service System and not on any constitutional right which petitioner possesses. It is not open to question that had Congress so desired it might have placed the entire Selective Service System in the control of the military or in the exclusive control of civilians. This being so, petitioner's contention on the merits comes to this: In performing his duties under the Selective Training and Service Act the President departed from the statutory limitation contained in Section 10 (a) (2) and (3) of the Act (Appendix A, *infra*, pp. 61–62) when he authorized General Hershey to act for him in deciding appeals to the President under the Selective Service Regulations. Thus, on this phase of the case, the issue is whether Congress has authorized judicial review in the midst of the

process of selection to determine whether the President violated the Selective Training and Service Act of 1940 when he designated General Hershey to act for him in deciding such appeals. Both the trial court (R. 10–11) and the court of appeals (R. 14–19) were of the view that such judicial review was not open to petitioner in his criminal trial, the trial court also holding, alternatively, that even if it were open, petitioner's contention is without merit.

Although the question is peculiar to the present Selective Training and Service Act,[2] it is not

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[2] The question did not arise under the 1917 draft law since criminal sanctions were not utilized in the last war for failure to report for induction. Rather, under the 1917 Act and regulations, a registrant was considered to be inducted and subject to military law immediately from the time designated to report. If he failed to report, he was subject to court martial for desertion. Articles of War, Sec. 2a, 41 Stat. 787, 10 U. S. C. 1473; Selective Service Regulations (1917) Secs. 133, 140; *Franke* v. *Murray*, 248 Fed. 865 (C. C. A. 8); cf. *United States* v. *Bullard*, 290 Fed. 704, 707 (C. C. A. 2), certiorari denied, 262 U. S. 760. Accordingly, the question of available defenses in a criminal proceeding for failing to report for induction was not presented.

But in habeas corpus proceedings brought by a registrant who had not reported for induction and who was held for desertion, it was ruled that erroneous and indeed arbitrary classification did not justify a refusal to report. See *Ex parte Romano*, 251 Fed. 762, 764 (D. Mass.). Under the 1917 Act, the Judge Advocate General repeatedly ruled that a plainly mistaken classification did not void the induction and accordingly the registrant was

wholly a new one. Substantially the same question was before this Court in *Bowles* v. *United States,* 319 U. S. 33, but that case was decided on other grounds. Shortly thereafter it was again before the Court in *Falbo* v. *United States,* 320 U. S. 549. We think that the rationale of the decision in that case dictates the answer to petitioner's contention in this case, namely, that petitioner had no right to defy the order to report for induction; persuasive considerations of orderly procedure require that he should have pursued the process of selection to its conclusion, at which point he would have been free to assert his challenge without disrupting the administrative process.[8] This would

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required to apply to the military for discharge. JAG 334.4, June 7, 1918; JAG 327.3, October 30, 1918, November 9, 1918. And an erroneous classification was held no defense in a court martial for desertion arising out of failure to report for induction. See C. M. 122312, Grant (1918) (Section 2238, Digest of Opinions, Judge Advocate General, Volume 1912–1930), in which it was stated—

"* * * While it is true there was no direct evidence that the accused was registered or classified, the order to entrain and proceed to camp is established beyond all doubt. That order imports rightfulness and verity as against any assault in these proceedings." (C. M. 122330, Choroshen; C. M. 114991, Aniki.)

[8] Had petitioner submitted to induction he would have been able to challenge the propriety of his induction either through the administrative procedure afforded by the War Department or by resorting to habeas corpus. By War Department Circular No. 270, December 27, 1941, it was provided that if a man was erroneously inducted because of the denial of "some legal right" in the course of the procedure leading up to induction, he would be separated

seem to be made plain by the requirement of Section 11 of the Act that selective service orders must, without exception, be obeyed.

As in petitioner's case, Falbo was indicted for knowingly failing to perform a duty required of him under the Act; Falbo wilfully failed to obey his local board's order to report for assignment to work of national importance. His proffered defense was that he had no "duty" to comply with his local board's order because it was based on an arbitrary classification. Similarly, petitioner sought to defend this prosecution on the ground that General Hershey's action on behalf of

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from service upon his written request and after report and recommendation of the individual's local board and of the State Director of Selective Service. Under Army Regulations 615–360, an individual may also be discharged if he is "inapt" or if he "does not possess the required degree of adaptability for the military service after reasonable attempts have been made to reclassify or reassign" him (Par. 51). Likewise it has been held that contentions of the same nature as petitioner's are cognizable in habeas corpus. See, for example, *United States ex rel. Beye* v. *Downer*, 143 F. (2d) 125 (C. C. A. 2); *United States ex rel. La Charity* v. *Commanding Officer United States Army Induction Center*, 142 F. (2d) 381 (C. C. A. 2); *United States ex rel. Reel* v. *Badt*, 141 F. (2d) 845 (C. C. A. 2); *United States ex rel. Lynn* v. *Downer*, 140 F. (2d) 397 (C. C. A. 2), certiorari denied, 322 U. S. 756; *United States ex rel. Brandon* v. *Downer*, 139 F. (2d) 761 (C. C. A. 2); *Ex parte Green*, 123 F. (2d) 862 (C. C. A. 2), certiorari denied, 316 U. S. 668; *United States ex rel. Zucker* v. *Osborne*, 54 F. Supp. 984 (W. D. N. Y.); *United States ex rel. Bayly* v. *Reckord*, 51 F. Supp. 507 (D. Md.); *United States ex rel. Cascone* v. *Smith*, 48 F. Supp. 842 (D. Mass.).

the President in deciding the State Director's appeal prevented the local board's induction order from imposing a "duty" on him. When the *Falbo* case was argued in this Court the Government showed that the order to report for induction is but an intermediate step in the selective service process, and it argued that the intent and scheme of the Selective Training and Service Act required that the order must be obeyed. The argument there made, and which is equally appropriate here, was that if armed forces are effectively to be raised and maintained it is of paramount importance that one who is called up respond promptly. The necessities of the situation are such that the nation cannot permit a registrant to disregard an order to report because he thinks the order is wrong, thus putting the burden on the Government to seek him out and proceed against him. In the *Falbo* case the further argument was made that considerations of due process are given full effect if a remedy is made available after the whole selective service process, including reporting and ultimate acceptance, has been completed. See Brief for the United States, No. 73, October 1943 Term, pp. 27–61.

This Court so held. In its opinion the Court recognized that when the Act was enacted "the Congress was faced with the urgent necessity of integrating all the nation's people and forces for

national defense. * * * Accordingly the Act was passed to mobilize national manpower with the speed which that necessity and understanding required" (320 U. S. at 551–552). The Court pointed out that the order to report for induction comes at an intermediate point in the selective process; it comes after the registrant has been classified but before his acceptability to the armed forces has been determined. It is "no more than a necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently" (320 U. S. at 553). In order to facilitate the speedy completion of the process, the Court stated, the registrant is obliged to obey the induction order. Laying at rest the same constitutional argument which petitioner here makes (Br. 20–21), the opinion concluded that "Even if there were, as the petitioner argues, a constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention before final acceptance of an individual for national service" (320 U. S. at 554). In answering the question raised by the facts of that case, the Court held that Congress had not authorized judicial review of Falbo's classification in the criminal prosecution (*Ibid.*):

> * * * The Act nowhere explicitly provides for such review and we have found nothing in its legislative history which

indicates an intention to afford it. The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created. To meet the need which it felt for mobilizing national manpower in the shortest practicable period, Congress established a machinery which it deemed efficient for inducting great numbers of men into the armed forces. Careful provision was made for fair administration of the Act's policies within the framework of the selective service process. *But Congress apparently regarded "a prompt and unhesitating obedience to orders" issued in that process "indispensable to the complete attainment of the object" of national defense. Martin* v. *Mott,* 12 Wheat. 19, 30. *Surely if Congress had intended to authorize interference with that process by intermediate challenges of orders to report, it would have said so.*

Against this background the complete absence of any provision for such challenges in the very section providing for prosecution of violations in the civil courts permits no other inference than that Congress did not intend they could be made. * * * [Italics added.]

The *Falbo* decision was characterized in *Yakus* v. *United States,* 321 U. S. 414, 446, as holding "that one charged with criminal violations of an order of his draft board may not challenge the

validity of the order if he has failed to pursue to completion the exclusive administrative remedies provided by the Selective Training and Service Act of 1940." See also *Billings* v. *Truesdell*, 321 U. S. 542, 558–559.

In this case, as in the *Falbo* case, the process of selection had not been completed at the time petitioner failed to respond to the induction order. There is not presented here the question whether under the new selective service procedure (see *Billings* v. *Truesdell*, 321 U. S. at 554), whereby the registrant is given a final-type physical examination prior to the issuance of the order to report for induction, the process is complete at the time of that examination. For the procedure at the time petitioner was classified and ordered to report for induction was the same as when Falbo was ordered to report for assignment to work of national importance.[4] In both cases in induction order was issued by the proper local board in the form prescribed by the regulations and it was valid on its face.

As the court below pointed out (R. 15–16), the only difference between this case and the *Falbo* case is the reason asserted to show the invalidity of the board order. In the *Falbo*

[4] For convenience we have reprinted in Appendix C, *infra*, pp. 79–83, the summary of the selective service process which we set forth in our brief in the *Falbo* case. That summary fully describes the process at the time petitioner was a party to it.

case the reason asserted was based on constitutional grounds; it was contended that the local board acted arbitrarily and that such conduct was in violation of the due process clause of the Fifth Amendment. In this case the claimed invalidity of the board's order does not rest on any constitutional ground. Rather, the contention is that the selective service procedure for deciding presidential appeals has departed from a statutory limitation in respect of the persons eligible to participate in the appellate functions of the selective service system. We perceive no greater responsibility on Congress to provide judicial review for interlocutory orders in the process of selection when the challenge to the order is that the administrative process has departed from a requirement of the statute than there was to provide such review when the claim asserted is that there has been a denial of due process of law. Cf. *Yakus* v. *United States, supra,* at 467 (dissent). Accordingly, we submit that the question of petitioner's right collaterally to attack the induction order in his criminal trial must be tested by the same considerations which governed in the *Falbo* case.

When so viewed it is clear, we think, that it is not open to petitioner to challenge the validity of the order in this prosecution. For the necessity for prompt compliance with the process of selection is just as great in this case as in the

Falbo case. Likewise the absence of any explicit provision for such review or of any legislative history showing an intention to provide it is just as pronounced when tested in the light of petitioner's contention as it was in the *Falbo* case. And, of course, the significant considerations against allowing litigious interruption of the process of selection are fully as applicable in this case as they were in the *Falbo* case.

Petitioner does not contend to the contrary. Rather, he seeks in effect to bring himself within the decision in *Tung* v. *United States,* 142 F. (2d) 919 (C. C. A. 1). The facts in that case may be briefly summarized as follows:

Tung, a citizen of China, registered under the Selective Training and Service Act and was classified I–A on September 25, 1942. Four days later, within the time for taking an appeal, he wrote his local board a letter, saying in part: "I appeal again not to be drafted to join the Army or Navy." The local board did not consider this letter as a notice of appeal and Tung's case was not reviewed by the board of appeal. On December 28, 1942, the local board ordered Tung to report for induction, and he refused to report as ordered. At his criminal trial Tung sought to defend himself on the ground, *inter alia,* that he was arbitrarily denied exemption from military service as a minister of religion or as a theological student. The court rejected his offer of proof and he was found guilty.

On appeal, however, the conviction was reversed. The circuit court of appeals took the view that Tung's letter to his local board constituted a valid exercise of his right to appeal and that Tung's appeal was therefore still pending before the board of appeal since no appellate action had been taken in respect of it. Since under Selective Service Regulation 627.41,[5] which was applicable to Tung's case, a registrant may not be inducted while his appeal to the board of appeal is pending, the court concluded that the induction order was void and therefore would not support a criminal prosecution. The key to the decision lies in the court's explanation of why it did not believe the *Falbo* decision applicable (pp. 921–922):

> In the Falbo case (320 U. S. at page 554, 64 S. Ct. at page 349) the Supreme Court said that "The narrow question" before it was "whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process." It answered this question in the negative holding that under the Act a registrant cannot challenge his classification in the courts until he had pursued the administrative remedies provided to the end, that is, up to the point of acceptance

[5] That regulation provided:

A registrant shall not be inducted either during the period afforded him to take an appeal to the board of appeal or during the time such an appeal is pending.

> for service by the military authorities. In the case at bar, however, the situation is quite different. Here the defendant when he was ordered to report for induction had not somewhere along the line by choice abandoned the administrative remedies given him by the Act, but instead was attempting to pursue them. Contrary to the government's view we are of the opinion that the Act, the Regulations and the implications of the Falbo decision, in which the Supreme Court (320 U. S. at page 552, 64 S. Ct. at page 347) said that the Selective Service System is designed "to operate as one continuous process for the selection of men for national service," (see Billings v. Truesdell, 64 S. Ct. 737) all point to the conclusion that a registrant has the right to pursue his administrative remedies uninterruptedly to the end, and that as a necessary consequence an order to report for induction issued while an appeal is pending in the system is void and need not be obeyed.

Regardless of whether the circuit court of appeals was correct in concluding that the local board had so far interrupted the administrative process that the considerations of the *Falbo* decision were not applicable, we think it clear that petitioner's case is not of the same nature.

Petitioner's argument, and the argument of the dissenting justice in the court below (R. 20–25), is that since military personnel may not participate in the decision of selective service appeals, the decision in his case by General Hershey, act-

ing for the President, was a nullity and the appeal therefore must be regarded as still "pending" before the President. Since under Selective Service Regulation 628.7 (Appendix B, *infra*, p. 78) a registrant may not be inducted while such an appeal is pending, petitioner argues that the induction order in his case was void and that, as in the *Tung* case, he was entitled to establish that fact as a defense because he was not allowed to complete the administrative process. The answer to the argument seems obvious. As a matter of actual fact, no appeal by petitioner is pending. The appeal was acted on in accordance with the established practice. All appeals to the President in the selective process are decided by General Hershey on behalf of the President (see *infra*, pp. 48–49). That is as much a part of the established selective process as is the decision of the local board in originally classifying a registrant.

Nor could the appeal be regarded as pending in a legal or constructive sense. The question turns solely on the Regulations, for petitioner's argument depends on a provision of the Regulations relating to inductions pending disposition of appeals. The difficulty with the argument is that it alternately relies on and rejects the Regulations. These were originally issued by the President*

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* The First Edition of the Regulations was promulgated by Executive Orders 8545 (5 F. R. 3779), 8560 (5 F. R. 3923), 8561 (5 F. R. 3935), 8570 (5 F. R. 4164), and 8574 (5 F. R. 4209).

and have since been amended from time to time by him and by the Director pursuant to the authority vested in him by Executive Order 8545.[7] The Regulations obviously contemplate that appeals to the President will be decided by the Director, in accordance with the specific delegation of presidential authority to him (see *infra*, pp. 48–49). Any other view of the Regulations impels the anomalous conclusion that regulations issued by the President and amended by the Director do not recognize the Director's action as the delegatee of the President's authority and, further, that every order of a local board directing a registrant to report for induction or for work of national importance issued after a presidential appeal had been decided by the Director is *ipso facto* illegal. The administrative procedure is not so at war with itself. What was said by Mr. Justice Holmes of the procedural privileges conferred by a statute is applicable to the Regulations here: "* * * if the statute cannot operate as it purports to operate it does not operate at all." (Concurring in *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U. S. 142, 151).

Petitioner's contention closely resembles that advanced by the defendant in *Bagley* v. *United States*, No. 10,574, decided June 14, 1944, opinion

[7] This was the order promulgating Volumes I and II of the First Edition of the Regulations. Paragraph 119a of Volume I authorized and directed the Director "To prescribe such amendments to these regulations as he shall deem necessary."

amended September 20, 1944 (C. C. A. 9).[*] In his criminal trial for failing to report for induction the defendant unsuccessfully sought to assert the defense that the induction order was void because, although he had been given a hearing before a hearing officer on his claim that he was a conscientious objector, it was not such a hearing "as the law granted him." He contended, as petitioner contends in this case, that the case should therefore be treated as though there had been no hearing at all. Relying on the rationale of the *Falbo* decision, the circuit court of appeals concluded:

> We think the position of appellant is untenable. He first admits that there was a hearing and concludes from the manner of the hearing that it was no hearing at all. His theory unjustifiably assumes the jurisdiction of the court to inquire into the regularity of the Board's order. Appellant's position is also untenable for the reason that the Falbo case precludes such inquiry since it is decided upon a principle applying as well to the facts of the instant case as to the facts of that case.
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> * * * * *
>
> It seems to us that if the order in the Falbo case would not cease to be an order upon the showing that it was based upon "antipathy" to appellant's religious sect, then by parity of reasoning the order in

[*] We have lodged a copy of that opinion with the Clerk of this Court.

> our case would not cease to be an order upon the showing suggested. * * *

In sum, we submit that in a case such as this, where no question exists as to the validity of the induction order on its face, the petitioner was under a clear obligation to obey the order and to defer his attack on it until he had completed his required participation in the administrative process. To permit petitioner to disobey an order to report for induction on the ground that he was unlawfully classified because the appeal of the State Director to the President was not decided by a civilian offers the same striking example of the consequences of allowing such litigious interference with the selective process as the *Falbo* case illustrated. On March 6, 1941 petitioner was classified as available for military service, but he was not ordered to report for induction until February 25, 1943, when the administrative appeals had been concluded. Today, one year and nine months after petitioner was ordered to report for induction into the armed forces, he is still litigating his "duty" to do so. Had he reported for induction on March 10, 1943, as directed by his local board, and, if he was found acceptable by the armed forces, had he submitted to induction, petitioner, as we have shown (*supra*, p. 14), could immediately have tested the legality of his induction by resorting to habeas corpus. He would not be faced with the prospect

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of imprisonment for having defied the order of his local board.

Finally, we think practical considerations of general importance militate against eroding the doctrine of the *Falbo* case. In order that the considerations which underlie the *Falbo* decision shall be successful in application it is essential that the fact be made clear to registrants that they are obliged to fulfil their part in the selective process and that review of their asserted grievances must be deferred until the process has been completed. That result cannot be achieved if the availability of judicial review before the selective process is completed is made to depend upon the technical nature of the grievance asserted. For otherwise, a registrant feeling aggrieved is encouraged unseasonably to withdraw from the selective process on the chance that his complaint is one that may be judicially reviewed despite the fact that it relates to an interlocutory matter and that it has not yet substantially prejudiced him.

II

SECTION 10 (b) OF THE SELECTIVE TRAINING AND SERVICE ACT AUTHORIZED THE PRESIDENT TO DELEGATE TO GENERAL HERSHEY, AS DIRECTOR OF SELECTIVE SERVICE, AUTHORITY TO DECIDE APPEALS TO THE PRESIDENT UNDER THE SELECTIVE SERVICE REGULATIONS.

If we are mistaken in our contention in Point I that petitioner was not entitled to attack collat-

erally the order to report for induction by way of defense to this prosecution, we reach the principal issue sought to be raised by petitioner: Whether the President departed from the terms of the Selective Service Act of 1940 when he reposed in General Hershey as Director of Selective Service the responsibility for deciding appeals to the President under the Selective Service Regulations. The problem is solely one of statutory construction and is limited to the administration of the Act prior to December 5, 1943, at which time Congress enacted a "clarifying" amendment resolving any possible ambiguity concerning the President's authority to designate General Hershey to act for him (see *infra,* pp. 52–53).

At the time of the appeal to the President in petitioner's case, Section 10 (b) of the Act provided:

> The President is further authorized, under such rules and regulations as he may prescribe, *to delegate and provide for the delegation of any authority vested in him under this Act to such officers, agents, or persons as he may designate or appoint for such purpose* or as may be designated or appointed for such purpose pursuant to such rules and regulations as he may prescribe. [Italics added.]

Having established by Executive Order a system of extraordinary appeals to the President in special cases (see *infra,* p. 48), the President, pur-

suant to the authority vested in him by Section 10 (b) of the Act, on December 23, 1940, delegated to the Director of the Selective Service System the power to act for him in deciding such appeals. (Executive Order 8619, 5 Fed. Reg. 5256.) It was in the exercise of this power that General Hershey decided the appeal to the President in petitioner's case. Petitioner contends that the President lacked authority to delegate this function to General Hershey because of the requirement of Section 10 (a) (2) of the Act that local boards, appeal boards and "agencies of appeal" shall be composed of civilians. Prior to December 5, 1943, that section provided in pertinent part:

> (a) The President is authorized—
>
> * * * * *
>
> (2) to create and establish a Selective Service System * * * and shall establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act. * * * No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian * * * Appeal boards and agencies of appeal within the Selective Service System

> shall be composed of civilians who are citizens of the United States. * * *"

Since General Hershey is "an officer of the United States Army on active duty, assigned to the Selective Service System, and as such detached from duty in the War Department" (R. 9) and since, among his duties as Director, he decides appeals to the President, petitioner argues that General Hershey is a non-civilian "agency of appeal."

The same question was sought to be raised on petition for rehearing in *Bowles* v. *United States, supra,* but the petition was denied. 319 U. S. 785. In the only other case in which, to our knowledge, the question was raised, the Circuit Court of Appeals for the Second Circuit decided that the question was rendered "academic" by the clarifying amendment of December 5, 1943 (see *infra,* pp. 52–53). *United States ex rel. Brandon* v. *Downer,* 139 F. (2d) 761, 766.

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[9] Consistent with the requirement of Section 10 (a) (2), subparagraph (3) authorized the President to appoint any officer on the active or retired list of the Army, Navy, Marine Corps or Coast Guard "to any office or position to carry out the provisions of this Act (except to offices or positions on local boards, appeal boards, or agencies of appeal established or created pursuant to section 10 (a) (2))." This provision appears to have been directed at avoiding the consequences of R. S. 1222 (10 U. S. C. 576) which provides that "no officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated."

PETITIONER'S STANDING TO RAISE THE QUESTION

Before proceeding to the merits of petitioner's argument, it should be stated that in our view he is not in a position to challenge the validity of the Director's authority to act on the appeal. The appeal was taken at petitioner's request (R. 7–8). It was an appeal which under the Regulations was not given as a matter of right but solely in the discretion of the Director (Section 628.1, *infra*, p. 75). This is not, therefore, a case where an appeal was taken by the State Director from a decision deemed too favorable to the registrant. Nor, indeed, is it a case in which the registrant himself was given a right of appeal, as would have been true if the appeal board had not been unanimous on a question of dependency (Section 628.2, *infra*, p. 76). The appeal was thus neither adverse to the registrant nor necessary on his part in order to exhaust his administrative remedies. Having invoked the benefits of the Presidential appeal under the Regulations, he is not in a position to attack the concomitant provision whereby such appeals are heard by the Director.[10]

Had petitioner's objection to the Director's authority led him to forego the appeal, he would not have prejudiced his right to contest, in the

[10] Executive Order 8619 (5 F. R. 5256), issued December 23, 1940, which empowered the Director to perform the functions of the President relating to appeals, provided that "the provisions of the Selective Service Regulations relating to such appeals are modified accordingly."

proper forum, the validity of his classification by the appeal board. Had petitioner brought to the attention of the State Director, his objection to the National Director's authority, the State Director might well have declined to take the appeal on petitioner's behalf as not being "in the public interest" within the meaning of the Regulations. For the effect of petitioner's position is that however his appeal might be decided, his classification must be overturned by virtue of the very act of decision on the appeal. Such a position is comparable to that which has led this Court in many cases to hold that one may not avail oneself of the benefits of a statute, or invoke its procedural advantages, and subsequently, upon being disappointed in the outcome, attack its validity. *E. g., Great Falls Manufacturing Company* v. *Attorney General*, 124 U. S. 581; *Electric Company* v. *Dow*, 166 U. S. 489; *Wall* v. *Parrot Silver and Copper Company*, 244 U. S. 407, 411–412; Mr. Justice Brandeis, concurring, in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 348; see 34 Col. L. Rev. 1495.

THE LEGISLATIVE BACKGROUND OF SECTION 10

To an exceptional degree the Selective Service Act of 1940 was the product of a legislative process having a considerable history. The dominant theme in that history, as we shall undertake to show, and the key to an understanding of the

meaning of Section 10, is adherence to the practice under the Selective Draft Act of 1917. The legislative history clearly shows, we believe, that the requirement of civilian personnel was intended to be applicable to those branches of the System which are below the President or the National Headquarters and which are primarily concerned with classifying registrants and taking and hearing appeals—in short, the local boards, the appeal boards, and the government appeal agents.

The 1917 Act (50 U. S. C. App. 201, *et seq.*) is the source of the requirement regarding civilian personnel. That Act provided in Section 4 for local boards and district (*i. e.,* appeal) boards, the members of which were not to be connected with the military establishment:

> The President is hereby authorized, in his discretion, to create and establish throughout the several States and subdivisions thereof and in the Territories and the District of Columbia local boards, * * * Such boards shall be appointed by the President, and shall consist of three or more members, none of whom shall be connected with the Military Establishment, to be chosen from among the local authorities of such subdivisions or from other citizens residing in the subdivision or area in which the respective boards will have jurisdiction under the rules and regulations prescribed by the President. * * *

> The President is hereby authorized to established additional boards, one in each Federal judicial district of the United States, consisting of such number of citizens, not connected with the Military Establishment, as the President may determine, who shall be appointed by the President. * * *
>
> Such district boards shall review on appeal and affirm, modify, or reverse any decision of any local board having jurisdiction in the area in which any such district board has jurisdiction under the rules and regulations prescribed by the President. * * *
>
> The decisions of such district boards shall be final except that, in accordance with such rules and regulations as the President may prescribe, he may affirm, modify, or reverse any such decision.

It will thus be seen that while specific provision was made for appeals to the President, the requirement of civilian personnel was not made applicable to such appeals as a limitation on the power of the President to delegate his functions in that respect. The regulations under the 1917 Act established a procedure for appeals to the President (Sections 111–114 (a)), but did not indicate whether the President personally decided the appeals or delegated that function. It was well known, however, that these appeals were decided

by the Provost Marshal General, who signed the decisions on appeal "By direction of the President."[11] The appeals were reviewed by officers in the national office of the System and submitted to the Provost Marshal General (General Crowder) for decision. See Second Report of the Provost Marshal General (1919), p. 253.[12]

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[11] Compare General Hershey's decision in this case (*supra*, p. 5) with a copy of a decision rendered by General Crowder in the last war:

Appeal No. 534.

APPEAL TO THE PRESIDENT OF THE UNITED STATES.

Under the Provisions of Section 4 of the Selective Service Act of May 18, 1917, and of Section 111 of the Selective Service Regulations.

From the decision of the District Board, Division No. 2, Northern District of Alabama, denying a claim for deferred classification in the case of

Albert Burton Moore.

Nature of Claim: Agriculture.

Decision of District Board AFFIRMED:

Registrant Classified: In last unlettered division of Class One.

By direction of THE PRESIDENT,

E. H. CROWDER,
Provost Marshal General.

WASHINGTON, *June 4, 1918.*

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[12] The Provost Marshal General "operated National Headquarters with a total of 430 persons, only 45 of whom were Army officers." *American Selective Service* (prepared under the supervision of the Joint Army and Navy Selective Service Committee), Oct. 1939, p. 13.

During the interim between the first World War and the enactment of the 1940 Act there was established a Joint Army and Navy Committee on Selective Service charged with responsibility for formulating plans for raising an army in the event of a national emergency.[13] This committee by 1940 had prepared a complete draft of a proposed Selective Service Act and of regulations to be issued pursuant thereto, which were modeled on the Act and Regulations in the first World War.[14] Working together with representatives of the Military Training Camp Association, a civilian organization, the committee prepared the bill which was introduced in the Senate (S. 4164; 86 Cong. Rec. 8680) on June 20, 1940, by Senator Burke and in the House (H. R. 10132; 86 Cong. Rec. 8908) on June 21, 1940, by Repre-

[13] This committee was created pursuant to Section 5 (b) of the National Defense Act of 1920 (10 U. S. C. 34) which provided that it shall be the duty of the War Department General Staff "to prepare plans * * * in conjunction with the naval forces * * * for the mobilization of the manhood of the Nation."

[14] For a more complete description of the activities of the committee see *American Selective Service*, a booklet prepared under the supervision of the committee and issued in October 1939, for the purpose of setting forth the historical background and the probable future form of a selective service program. See also 86 Cong. Rec. 10112–10115; Hearings before the Committee on Military Affairs of the United States Senate, S. 4164, 76th Cong., 3d sess., pp. 372–376; *Selective Service in Peacetime*, First Report of the Director of Selective Service, 1940–1941, pp. 9–11.

sentative Wadsworth.[15] The bills were referred to the respective Committees on Military Affairs. We are advised by the Selective Service System that members of the Joint Committee worked in an advisory capacity with the Military Affairs Committees of both houses of Congress in their consideration of the selective service legislation and, as the committee hearings show, testified before the committees.

That bill, as introduced,[16] did not refer specifically to appeal boards, but introduced the phrase "agencies of appeal". It authorized the President "to establish local boards and such other agencies, including agencies of appeal, as he may deem necessary to carry the provisions of this act into effect." It provided that the decisions of local boards should be final "except where an appeal is authorized in accordance with such rules or regulations as the President may prescribe." Thus the bill omitted specific mention not only of appeal boards, but of appeals to the President and of a requirement of civilian personnel, all of which had been included in the 1917 Act.

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[15] After the bill was introduced in Congress a civilian committee was appointed by the President "to cooperate with the Joint Army and Navy Selective Service Committee in planning 'the procurement of manpower for our National Defense under the Compulsory Military Training bill pending before Congress.'" See *Selective Service in Peacetime*, p. 11.

[16] The relevant portions of the bill are set forth in Appendix E, *infra*, p. 85.

But it is clear from the legislative history and the draft of regulations which had been prepared that these matters were intended to be covered by regulations which would embody the practice under the 1917 Act. Senator Sheppard, the Chairman of the Senate Military Affairs Committee, explained to the Senate that "The classification will be made by local boards composed of civilians, who will be neighbors of the men to be classified." 86 Cong. Rec. 10093. The draft of proposed regulations, beginning as early as 1932, provided that members of local boards and of Boards of Appeal should not be "members of the public armed forces." [17] In *American Selective Service* (*supra*

[17] See Sections 76 and 77, proposed Selective Service Regulations (Classification, Induction and Entrainment), 1932 Edition, filed in Reference Library, Selective Service Headquarters.

Section 76 b. (2) provided in part as follows:

> Persons appointed members of Local Boards must be male citizens of the United States, not members of the public armed forces, should be residents of the district for which appointed and should be over thirty-one years of age.

Section 77 c. (1) provided as follows:

> *Appointment.*
>
> In each of the districts created as described above, the President will appoint a Board of Appeal, which Board of Appeal will normally consist of five members, residents of the district for which they are appointed, over thirty-one years of age, who must be male citizens of the United States, not members of the public armed forces. The Governors and the Commissioners of the District of Columbia will be prepared to rec-

note 12), the Joint Committee had stated, in 1939, concerning the System in the first World War, that "The dominating features of Selective Service were its strictly civilian nature and its intimate local administration. * * * It is planned to follow the same principles in any future Selective Service" (p. 17); and had described as "wholly civilian" the local boards and "consultant and appellate agencies" consisting of "district boards (i. e., appeal boards), boards of instruction, medical and legal advisory boards, industrial advisors, and Government appeal agents." (p. 13). The use of the term "appellate agencies" and its evident meaning are significant, particularly since it was recognized that at National Headquarters the Provost Marshal General was in charge and 45 of his assistants "were Army officers." (*Ibid.*)

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ommend suitable personnel to constitute such Boards of Appeal."

The above language of Sections 76 and 77 was carried over into the 1933 Edition of the proposed Selective Service Regulations. The 1933 Edition of the Selective Service Regulations remained unchanged between 1933 and 1940. This edition formed the basic material studied by the Joint Army and Navy Selective Service Committee, the Reserve Officers assigned to that work and the National Guard Officers in the various states in planning for the Selective Service System. The 1933 edition of the Selective Service Regulations was used in the preparation of the First Edition, Selective Service Regulations, promulgated by the President in October 1940.

The model of the 1917 practice was likewise advanced by General Hershey, then executive officer of the Joint Committee, in explaining to the Senate Military Affairs Committee in July 1940 the selective service system which would be established if the bill became law.[18]

On August 5, 1940, the bill was favorably reported to the Senate substantially in the form in which it was enacted into law. The Committee, however, amended Section 10 (a) (2) expressly to provide for "appeal boards" as was provided in the Selective Draft Law of 1917 (*supra*, p. 35), though the term "agencies of appeal" was retained; and the President's power of delegation was broadly stated.[19] The Committee Report ad-

[18] Hearings before the Senate Committee on Military Affairs, S. 4164, 76th Cong., 3d sess., pp. 372–385. See, *e. g.*, at p. 383: "We have three men on the [local] board. They have a medical examiner and Government appeal agent, who looks out for the legal rights of the Government and also the legal rights of the men. Above that, in each State * * * we have an appeal board to whom appeals go from the local boards. When a man wants to appeal from the decision of a local board, *in rare cases those appeals come to the national headquarters.*" [Emphasis added.] This was of course based on the proposed Regulations, not on the express terms of the bill.

[19] As amended by the committee, Section 10 provided in pertinent part:

> (a) The President is authorized—
>
> * * * * *
>
> (2) * * * to establish local boards and such other agencies, including appeal boards and agencies of ap-

verted to the right of appeal in certain cases from the local board to an appeal board, but no mention was made of any right of appeal to the President or of any limitation imposed upon the President's power to delegate.[20]

It was during consideration of the bill on the floor of the Senate that Section 10 was amended to restrict the membership of local boards, appeal boards, and agencies of appeal to civilians. Senator White offered the amendment, which was adopted without debate, because he believed that otherwise Section 10 permitted a departure from the principles which operated so successfully in the first World War. Senator White was not a member of the Military Affairs Committee. In view of his purpose to make the present law conform to the 1917 law, and the legislative background just set forth, it is not surprising that his suggested amendment was accepted without hesitation by Senator Sheppard, chairman of the Military Affairs Committee. The colloquy follows (86 Cong. Rec. 10927):

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peal, as he may deem necessary to carry the provisions of this Act into effect.

* * * * *

(b) The President is authorized, under such rules and regulations as he may prescribe, to delegate any authority vested in him under this Act to such officers, agents, or persons as he may designate or appoint for such purpose.

[20] See Senate Report No. 2002, 76th Cong., 3d sess., p. 9.

Mr. WHITE. * * * I do not know what the intention of the authors of this proposed legislation was, but it is perfectly certain that a very radical departure has been made from the principles which governed in the drafting of the 1917 act. In that act it was expressly provided in words that the members of the local board should not be connected with the Military Establishment. Why there has been left out of this bill that language I am not clear; but it is perfectly certain, as this language now stands, that the President could appoint a top sergeant at the head of every one of these boards, or he could make the top sergeant the sole member of every local board.

There is another departure from the principles of the 1917 act. In that act there was given a drafted man an absolute right of appeal from the decisions of the local board to the district board. That absolute right of appeal is not given by express language in this proposed legislation. At the most it can only be inferred from the provision in the pending measure that district and appeal boards may be authorized by the President under rules and regulations prescribed by him. If it is not the purpose to have military boards, then the language which I have submitted should be accepted.

Mr. SHEPPARD. I accept both amendments of the Senator from Maine.

That Senator White, and his colleagues in the Senate, were motivated by a desire to make the appellate process in the Selective Service System adhere to that which prevailed in the last war is further illustrated by a second amendment to Section 10 (a) (2) offered by the Senator, to provide a statutory right of appeal to the board of appeal from the action of a local board. This amendment likewise was accepted, but after the following colloquy (86 Cong. Rec. 10932):

> Mr. SHEPPARD. As I understand the purpose of the amendment, it is to make certain the right of appeal.
>
> Mr. WHITE. The 1917 act gave in express terms a right of appeal. There is no such language in the bill before us. There is no absolutely satisfactory right of appeal given in the bill; neither is there in the pending bill any statement of the questions which may be the subject of appeal.
>
> The amendment is a paraphrase of the 1917 language. It gives an absolute right of appeal from the local boards to the appeal boards set up, and it sets forth the questions which may be the subject of appeal.

The amendments offered by Senator White, with insignificant verbal modifications, were incorporated into the draft of the bill which was

reported out by the House Military Affairs Committee [21] and passed by the House.

[21] H. Rep. 2903, 76th Cong., 3d sess. This Report summarized the pertinent provisions of Section 10 as follows (pp. 7–8):

> Section 11 (a) [10 (a)] gives the President power to prescribe the necessary regulations to carry the bill into effect, to utilize the services of departments, officers, and agents of the United States and of the several States, Territories, and the District of Columbia, and subdivisions thereof, in the execution of the bill, and to require of each the performance of such duties as he directs, * * *
>
> The President is also authorized to create and establish a selective-service system and to provide for the classification of registrants on the basis of availability for training and service, and to establish civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary. One or more local boards is to be created in each county, or political subdivision corresponding thereto, of each State, Territory, the District of Columbia, and the possessions of the United States. Each local board is to consist of three or more members, to be appointed by the President from recommendations made by the respective State governors. None of the local board members is to be a member of the armed forces, and each such member must be a civilian and a citizen of the United States residing in the subdivision or area in which the local board of which he is a member will have jurisdiction.
>
> The local boards are given power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards, all questions of exemption or deferment from training and service under the bill, and all questions of or claims for inclusion for training, or exemption or deferment from training or service of all individuals within the jurisdiction of the board. The decisions of the local boards

THE ADMINISTRATIVE INTERPRETATION OF SECTION 10

As we have shown, the basic plan embodied in the Selective Training and Service Act of 1940 is traceable to the Joint Army and Navy Selective Service Committee, whose proposals, in turn, were predicated upon the Selective Draft Act of 1917. Consequently, when the Burke-Wadsworth bill was enacted into law, General Hershey and his fellow officers were called upon to move forward immediately with the administrative organization which the General had previously described to the Military Affairs Committee of the Congress (see *supra,* p. 41). Especially in the circumstances of this legislation, we think their interpretation of Section 10 is entitled to great weight, for "the [administrative] interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " *United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 544, 549.

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are made final except where an appeal is authorized in accordance with the rules and regulations of the President. The appeal boards and agencies of appeals are to be created within the selective service system, and persons comprising such appeal boards are to be civilians and citizens of the United States. * * *

There are also two Conference Reports on the bill, H. Report No. 2937, dated September 12, 1940, and H. Report No. 2947, 76th Cong., 3d sess., but neither report casts further light upon the meaning of Section 10.

Furthermore, the administrative interpretation gains much persuasiveness from the fact that it was these responsible officials of the Selective Service System who, for the most part, prepared the selective service legislation for enactment by Congress. *Ibid.*

Pending the appointment of a Director of Selective Service, the President issued Executive Orders No. 8553 (5 F. R. 3887) and No. 8559 (5 F. R. 3923) authorizing General Hershey to perform specified administrative duties and to appoint the necessary persons to perform the local functions of the Selective Service System.[22] On October 15, the President's nomination of Dr. Clarance A. Dykstra to be Director of Selective Service was confirmed (86 Cong. Rec. 13578) and he became the first Director of the Selective Service System. In December 1940, General Hershey was appointed Deputy Director of Selective Service (86 Cong. Rec. 13973), with full authority in the Director's absence, which office he held until he was appointed Director in July 1941 to succeed Dr. Dykstra who had resigned (87 Cong. Rec. 6519).[23] Shortly after signing the Selective Training and Service Act, the President on September

[22] General Hershey was assigned to the Selective Service System on September 30, 1940, by War Department Special Orders 231.

[23] For a full summary of the organization of the Selective Service System and a list showing the significant dates in selective service history see *Selective Service in Peacetime*, The First Report of the Director of Selective Service, pp. 3–27.

23, 1940, issued Executive Order No. 8545 (5 F. R. 3779) prescribing Volume One of the Selective Service Regulations, which related to the organization and administration of the Selective Service System. In compliance with Section 10 (a) (2) of the Act, the President provided in paragraph 103 of these regulations that government appeal agents and members of local boards and boards of appeal should be civilians. Thus, the President evidently construed "agency of appeal" to mean, or at least to include, government appeal agents. The earlier drafts of proposed regulations, prior to the Act, had not extended the civilian requirement to appeal agents. Cf. note 17, p. 39, *supra*. Paragraphs 135 and 140 of the regulations defined the jurisdiction of the local and appeal boards and provided that "the decision of the board of appeal shall be final, unless modified or reversed by the President." Provision for an extraordinary appeal to the President was likewise set forth in Volume Three of the Regulations, relating to the classification and selection of registrants, which was promulgated by the President by Executive Order 8560 (5 F. R. 3923).

On December 23, 1940, before any appeals to the President had been perfected, he issued Executive Order 8619 (5 F. R. 5256) empowering the Director of Selective Service "to perform all of the functions and duties vested in the President by the [Selective Training and Service] Act that relate to appeals from the determination of boards

of appeal. The provisions of the Selective Service Regulations relating to such appeals are modified accordingly." Pursuant to that authority the Director of Selective Service has decided every appeal to the President under the Selective Service Regulations. We are advised by the Selective Service System that by December 1, 1943, the Director of Selective Service had decided 33,873 appeals to the President. Aside from a relatively insignificant number of such appeals decided by Dr. Dykstra during the period from February 10, 1941 to April 1, 1941, all of these appeals were decided by General Hershey in pursuance of the President's delegation of authority and in conformity with the procedure which was followed in petitioner's case.

The unqualified administrative interpretation of Section 10 is plain.[24] In the view of the President, General Hershey and the other responsible

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[24] See generally, *Selected Service in Wartime*, Second Report of the Director of Selective Service, 1941–42. At page 32 the Report states:

> The principal administrative and supervisory officers at the National and State Headquarters and the regional officers in the 12 regions are officers of the armed services. On November 30, 1942, there were 105 army officers, 10 navy officers, and 7 officers of the Marine Corps on duty with the National Headquarters, including the 12 regional offices. There were at the same time 387 army officers and naval officers on duty at State Headquarters, no officers of the Marine Corps being assigned to such duty. *No officers or other military personnel are on duty with the local boards, the boards of appeal, or other local agencies of the Selective Service System, such assignment being forbidden by law.* [Emphasis added.]

officials of the Selective Service System, Section 10 adheres to the administrative scheme of the first World War. Accordingly, Section 10 (a) (2) was construed as relating to the local organization of the Selective Service System—the local board, the appeal board and the government appeal agent; it was not construed as a limitation on the exercise of Presidential functions delegated by the President under Section 10 (b).

CONGRESSIONAL APPROVAL OF THE ADMINISTRATIVE CONSTRUCTION

The practice under which presidential appeals are decided by the Director "did not," to use the words of Marshall, "steal upon an unsuspecting legislature." *McCulloch* v. *Maryland,* 4 Wheat. 316, 402. The appointment of General Hershey as Director was confirmed by the Senate in July 1941, after he had served for more than six months as deputy director, with power, in the absence of the Director, to pass on presidential appeals. 87 Cong. Rec. 6519. Later, on April 16, 1942, the Senate confirmed his elevation to the rank of major general. 88 Cong. Rec. 3498. He has frequently appeared before committees of both Houses to explain in detail the operation of the selective service system and his functions and duties as Director.[25] In addition, comprehensive

[25] See, e. g., Hearings before House Committee on Military Affairs, H. R. 7528, 77th Cong., 2d sess., pp. 79 to 124, 127 to 143, and particularly pp. 128–129, where General Hershey stated that he decided appeals to the President.

annual reports have been prepared and widely distributed, in which the procedure in connection with presidential appeals has been explained. See *Selective Service in Wartime* (Second Report of the Director of Selective Service, 1941–42), p. 42: "There remains a final appeal to the President provided for in the regulations. The President has delegated this final decision to the Director of Selective Service who is advised by a group of officers who are assigned to this important function." Moreover, the practice in question is not an obscure or technical one upon which knowledge by Congress could not safely be assumed. In view of the many thousands of presidential appeals actually decided, and the fact of common knowledge that the President himself did not make the decisions but had delegated this duty to the Director, it requires no artificial presumption to impute this knowledge to Congress.

During this entire period Congress has never questioned the validity of the practice regarding presidential appeals, though numerous amendments to, and appropriations for, the Act have been enacted.[28] In these circumstances we think that what was said in *United States* v. *Midwest Oil*

[28] 54 Stat. 965; 55 Stat. 9; *id.* 92, 116; *id.* 150; *id.* 211; *id.* 541, 547; *id.* 621; *id.* 626; *id.* 799; *id.* 810, 816; *id.* 844; *id.* 861; 56 Stat. 98, 101; *id.* 226, 237; *id.* 392, 415; *id.* 723; *id.* 1018; *id.* 1049; 57 Stat. 4; *id.* 57; *id.* 347, 350; *id.* 391; *id.* 431, 441; *id.* 494, 518.

Company, 236 U. S. 459, 472–473, is applicable here:

> * * * Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

Finally, there is strong affirmative evidence that Congress agreed with the construction of Section 10 reflected in the administrative practice. That evidence consists in the adoption of the Act of December 5, 1943, 57 Stat. 596, which, among other things, amended Section 10 (a) (2) of the Act to state expressly that the requirement of civilian personnel extended only to members of local boards and appeal boards.[27] As amended, Section 10 (a) (2) now provides that the President is authorized:

[27] The act also added a new paragraph (1) to Section 5 of the Selective Training and Service Act providing in pertinent part:

> The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from, training and service under this Act; and the determination of the President shall be final.

> to create and establish a Selective Service System, * * * and * * * establish within the Selective Service System civilian local boards, civilian appeal boards, and such other agencies, including agencies of appeal, as may be necessary to carry out the provisions of this Act. * * *

The House Military Affairs Committee stated the purpose of the amendment as follows:

> Section 2 of the House amendment is contained in the original Selective Service Act. Due to the confusion that seems to exist as to the authority of the State directors of the Selective Service to act as agencies of appeal because of the fact that such persons are members of the military service, *your committee felt that clarifying language was necessary in order that the intent of the Congress might be made definite; i. e., that the local boards and the local appeal boards should be made up of civilians exclusively.* Since the original passage of the Selective Training and Service Act military personnel has served on the higher boards of appeal, but because of the lack of specific authorization in the original language, your committee feels that this clarification is necessary. (H. Rep. No. 787, 78th Cong., 1st sess., p. 5) (emphasis added.)

Aside from charging the Military Affairs Committee of the House with being "disingenuous," petitioner urges, relying on *Haggar Co.* v. *Helvering,* 308 U. S. 389, 400, that "retroactive declara-

tions of legislative intent, prejudicial to those who have acted under an earlier statute whose construction seems clear" ought not to be implied (Br. 14–15). But this language from the *Haggar* case was addressed to an argument that an administrative construction which Congress by amendment expressly disapproved for the future should be taken to have been approved as to the past. In the present case, on the contrary, the Congressional action is in harmony with the prior construction, and the committee report does not leave the purpose of the amendment to implication. The December 5, 1943, amendment, as the House Report shows, was not new law but "a more explicit expression of the purpose of the prior law." See *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 469; *Jordan* v. *Roche*, 228 U. S. 436, 446; see also *Cope* v. *Cope*, 137 U. S. 682, 688; *United States* v. *Freeman*, 3 How. 556, 564.

That the decision of appeals to the President by General Hershey did not conflict with the congressional purpose is further evidenced by the Amendment of Section 10 (b) by the Act of December 5, 1943 (*infra*, p. 67) to provide that:

> The President is authorized to delegate to the Director of Selective Service only, any authority vested in him under this Act (except section 9). The Director of Selective Service may delegate and provide for the delegation of any authority so delegated to him by the President and any other authority vested in him under this

> Act, to such officers, agents, or persons as he may designate or appoint for such purpose or as may be appointed for such purpose pursuant to such rules and regulations as he may prescribe.

The amendment apparently was occasioned by Executive Order No. 9279, December 5, 1942 (7 F. R. 10177) (Br. 26–29) transferring the Selective Service System to the War Manpower Commission and delegating to the Chairman of the Commission the authority which the President had previously delegated to the Director of Selective Service.[28] The reasons for the amendment are not material here, but it should be noted that by the amendment Congress required the President to revoke his delegation of authority to the Chairman of the War Manpower Commission, a civilian, and, if he delegated it, to lodge it in the Director of the Selective Service System, who was then General Hershey. The amendment accomplishes what we believe Congress contemplated would happen, and at the very least what it authorized, when it originally enacted the Selective Training and Service Act.

It is clear from the historical materials, as it is from the language and organization of Section

[28] These powers were immediately sub-delegated by the chairman to the Director of Selective Service. Administrative Order No. 26 (7 F. R. 10512.) (Br. 29–30.) Executive Order 9410 (8 F. R. 17319) transferred the Selective Service System out of the War Manpower Commission as of December 5, 1943.

10, that Section 10 (a) (2) and (3) is concerned with a matter wholly different from the President's power to delegate his responsibilities and that it is not a limitation on the authority conferred upon the President by Section 10 (b). It is concerned with the organization of the local elements of the Selective Service System—the local boards, the appeal boards and the other agencies necessary to execute the local functions of that System. In respect of those agencies, the intention of the Congress plainly was to adhere to the same local administrative organization which had functioned so successfully in the last war, including the requirement that these agencies should be composed of civilians. Senator White's explanation on the floor of the Senate to this effect (*supra*, p. 43) resolves any possible doubt on this point. Recognizing the congressional purpose, the Selective Service System, in so far as is here pertinent, has been organized on lines which closely parallel those of the selective service organization of the first World War. The local boards, appeal boards and government appeal agents are all civilians in accordance with Section 10 (a) (2). The President's responsibilities under the Act are lodged in the Director of Selective Service and, as in the last war, the Director of Selective Service, an Army officer, decides appeals to the President on his behalf.

If it be argued that logically a requirement of civilian personnel for appeal agencies should carry

through to whoever performs an appellate function for the President, to make the safeguard complete, the answer is twofold. In the first place, if we are free to speculate, those who were responsible for the legislation may have regarded the displacement of civilians by military personnel on the local level as a different matter from the utilization of a highly placed military officer to act for the President in appeals as well as in other highly important tasks of policy and administration, the latter being unquestionably within the statutory competence of a military officer. There may, indeed, be advantages in thus combining responsibilities of policy-making and decision at the highest level. In the second place, the oustandingly plain feature of the legislative purpose was to conform to the 1917 practice, and that has been faithfully observed.

Petitioner has suffered no demonstrable prejudice from the fact that the President delegated his powers to a military officer rather than to a civilian. He was classified I–A by his local board composed of civilians, that classification was reviewed *de novo* and affirmed by his appeal board which was also composed of civilians, after a recommendation by a civilian hearing officer and the Department of Justice, and that action was affirmed on extraordinary review by the President acting through General Hershey. In these circumstances we submit that the Court should be

especially hesitant to adopt a construction of Section 10 which would cast doubt upon the classification of over 30,000 persons and which might mean that thousands of men in the armed forces must be returned to civilian life in order that they may be reclassified and reinducted. Neither the language of Section 10 nor its legislative history requires or justifies such a conclusion.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the United States Court of Appeals for the District of Columbia should be affirmed.

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DECEMBER 1944.

APPENDIX A

The Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. Appendix 301–318) provided, in part, as follows:

SEC. 5. * * *

(g) Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. Any such person claiming such exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board provided for in section 10 (a) (2). Upon the filing of such appeal with the appeal board, the appeal board shall forthwith refer the mat-

ter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof. After appropriate inquiry by such agency, a hearing shall be held by the Department of Justice with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board (1) that if the objector is inducted into the land or naval forces under this Act, he shall be assigned to noncombatant service as defined by the President, or (2) that if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be assigned to work of national importance under civilian direction. If after such hearing the Department finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall give consideration to but shall not be bound to follow the recommendation of the Department of Justice together with the record on appeal from the local board in making its decision. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

* * * * *

SEC. 10 (a). The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. Each local board shall consist of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules

and regulations as the President may prescribe. Appeal boards and agencies of appeal within the Selective Service System shall be composed of civilians who are citizens of the United States. No person who is an officer, member, agent, or employee of the Selective Service System, or of any such local or appeal board or other agency, shall be excepted from registration, or deferred from training and service, as provided for in this Act, by reason of his status as such officer, member, agent, or employee;

(3) to appoint by and with the advice and consent of the Senate, and fix the compensation of at a rate not in excess of $10,000 per annum, a Director of Selective Service who shall be directly responsible to him and to appoint and fix the compensation of such other officers, agents, and employees as he may deem necessary to carry out the provisions of this Act: *Provided,* That any officer on the active or retired list of the Army, Navy, Marine Corps, or Coast Guard, or of any reserve component thereof or any officer or employee of any department or agency of the United States who may be assigned or detailed to any office or position to carry out the provisions of this Act (except to offices or positions on local boards, appeal boards, or agencies of appeal established or created pursuant to section 10 (a) (2)) may serve in and perform the functions of such office or position without loss of or prejudice to his status as such officer in the Army, Navy, Marine Corps, or Coast Guard or reserve component thereof, or as such officer or employee in any department or agency of the United States: *Provided further,* That any person so appointed, assigned, or detailed to a position

the compensation in respect of which is at a rate in excess of $5,000 per annum shall be appointed, assigned, or detailed by and with the advice and consent of the Senate * * *.

(b) The President is further authorized, under such rules and regulations as he may prescribe, to delegate and provide for the delegation of any authority vested in him under this Act to such officers, agents, or persons as he may designate or appoint for such purpose or as may be designated or appointed for such purpose pursuant to such rules and regulations as he may prescribe.

SEC. 11. Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration

or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the Administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act.

* * * * *

The Act of December 5, 1943, 57 Stat. 596, amended the Selective Training and Service Act to read as follows:

SEC. 5 * * *

(l) In the case of any registrant whose principal place of employment is located outside the appeal board area in which the

local board having jurisdiction over the registrant is located, any occupational deferment under subsection (c) (2) or subsection (e) of this section existing at the date of enactment of this subsection shall within thirty days after such date, and any such occupational deferment made after the date of enactment of this subsection shall within ten days after such deferment is made, be submitted for review and decision to the selective service appeal board having jurisdiction over the area in which is located the principal place of employment of the registrant. Such decision of the appeal board shall be final unless modified or changed by the President, and such decision shall be made public. The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from, training and service under this Act; and the determination of the President shall be final.

* * * * *

Sec. 10 (a) * * *

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards, civilian appeal boards, and such other agencies, including agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and

the District of Columbia. Each local board shall consist of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President as provided in the last sentence of section 5 (l) of this Act. * * *

(3) to appoint, by and with the advice and consent of the Senate, and fix the compensation of at a rate not in excess of $10,000 per annum, a Director of Selective Service who shall be directly responsible

to him and to appoint and fix the compensation of such other officers, agents, and employees as he may deem necessary to carry out the provisions of this Act: *Provided,* That any officer on the active or retired list of the Army, Navy, Marine Corps, or Coast Guard, or of any reserve component thereof or any officer or employee of any department or agency of the United States who may be assigned or detailed to any office or position to carry out the provisions of this Act (except to offices or positions on local boards or appeal boards established or created pursuant to section 10 (a) (2)) may serve in and perform the functions of such office or position without loss of or prejudice to his status as such officer in the Army, Navy, Marine Corps, or Coast Guard or reserve component thereof, or as such officer or employee in any department or agency of the United States: *Provided further,* That any person so appointed, assigned, or detailed to a position the compensation in respect of which is at a rate in excess of $5,000 per annum shall be appointed, assigned, or detailed by and with the advice and consent of the Senate * * *

(b) The President is authorized to delegate to the Director of Selective Service only, any authority vested in him under this Act (except section 9). The Director of Selective Service may delegate and provide for the delegation of any authority so delegated to him by the President and any other authority vested in him under this Act, to such officers, agents, or persons as he may designate or appoint for such purpose or as may be designated or appointed for such purpose pursuant to such rules and regulations as he may prescribe.

APPENDIX B

The Selective Service Regulations applicable to petitioner provided as follows:

> 622.11 *Class* I–A: *Available for military service.*—In Class I–A shall be placed every registrant who, upon classification, has not been placed in Class I–C, Class IV–E, Class I–A–O, or in a deferred class.
>
> * * * * *
>
> 627.1 *Who may appeal any determination of a local board to a board of appeal at any time.*—(a) Either the State Director of Selective Service or the Director of Selective Service may appeal from any determination of a local board.
>
> (b) Either the State Director of Selective Service or the Director of Selective Service may take such an appeal at any time.
>
> 627.2 *Who may appeal registrant's classification to board of appeal under certain circumstances.*—(a) The registrant, any person who claims to be a dependent of a registrant, any person who has filed written evidence of the occupational necessity of a registrant, or the government appeal agent may appeal to a board of appeal from any classification of a registrant by the local board except that no such person may appeal from the determination of the registrant's physical or mental condition by

the examining physician, the examining station of the armed forces, or the local board.

(b) The government appeal agent may take any appeal authorized under paragraph (a) of this section at any time within 10 days after the date when the local board mails to the registrant a Notice of Classification (Form 57) or at any time before the registrant is mailed an Order to Report for Induction (Form 150).

(c) The registrant, any person who claims to be a dependent of the registrant, or any person who has filed written evidence of the occupational necessity of the registrant may take an appeal authorized under (a) above at any time within 10 days after the date when the local board mails to the registrant a Notice of Classification (Form 57). At any time prior to the date that the local board mails to the registrant an Order to Report for Induction (Form 150), the local board may permit any such person to appeal, even though such 10-day period has elapsed, if it is satisfied that the failure of such person to appeal within the 10-day period was due to a lack of understanding of the right to appeal or to some cause beyond the control of such person. Unless the local board thereafter permits an appeal, the right of such persons to appeal shall expire at the end of the 10-day period. If such an extension of time to appeal is granted by the local board, a record thereof shall be entered on the Selective Service Questionnaire (Form 40) under the heading "Minutes of Other Actions."

* * * * *

627.11 *How appeal to board of appeal is taken.*—(a) Any person entitled to do so may appeal in either of the following ways:

(1) By filing with the local board a written notice of appeal. Such notice need not be in any particular form but must state the name of the registrant and the name and identity of the person appealing so as to show the right of appeal.

(2) By signing the "Appeal to Board of Appeal" on the Selective Service Questionnaire (Form 40).

627.12 *Statement of person appealing.*—The person appealing may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.

627.13 *Local board to transmit record to the board of appeal.*—(a) Immediately upon an appeal being taken to the board of appeal, the local board shall carefully check the registrant's file to make certain that all steps required by the regulations have been taken and the record is complete. If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts. In preparing such a summary the local board should be careful to avoid the expression of any opinion concerning information in the registrant's file and

should refrain from including any argument in support of its decision.

(b) Immediately upon determining that all steps required by the regulations have been taken and that the record is complete, the local board shall transmit the file to the board of appeal, provided that the State Director of Selective Service may direct the channels through which such file shall be forwarded to the board of appeal.

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627.23 *Preliminary review.* The board of appeal shall make a preliminary review of each registrant's file received on appeal. If it deems the record to be incomplete or the information in the file insufficient to enable it to determine the classification of the registrant, it shall return the file to the State Director of Selective Service with an explanation of the reason therefor. The State Director of Selective Service shall either return the file to the board of appeal with instructions to determine the appeal upon the record or he shall forward the file to the local board with such instructions as he deems necessary in order to complete the record or supply the information requested by the board of appeal. When the local board has carried out such instructions it shall return the file to the State Director of Selective Service. The State Director of Selective Service shall check the file to make certain his instructions have been carried out and shall then return the file to the board of appeal.

627.24 *Review by board of appeal.*—(a) The board of appeal shall consider appeals in the order in which they are received.

(b) In reviewing the appeal, no information shall be considered which is not con-

tained in the record received from the local board and the decision of the board of appeal shall be based solely thereon.

627.25 *Special provisions where appeal involves claim that registrant is a conscientious objector.*—(a) If an appeal involves the question of whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the board of appeal shall first determine whether the registrant should be classified in Class I–C, Class IV–F, Class IV–D, Class IV–C, Class IV–B, Class IV–A (not considered in time of war), Class III–A, Class II–B, Class II–A, or Class I–H, in the order listed, and if it so determines, it shall place such registrant in such class. If the board of appeal does not determine that such registrant belongs in one of such classes, it shall transmit the entire file to the United States district attorney for the judicial district in which the local board of the registrant is located for the purpose of securing an advisory recommendation of the Department of Justice. No registrant's file shall be forwarded to the United States district attorney by any board of appeal and any file so forwarded shall be returned, unless in the "Minutes of Other Actions" on the Selective Service Questionnaire (Form 40) the record shows and the letter of transmittal states that the board of appeal reviewed the file and determined that the registrant should not be classified in Class I–C, Class IV–F, Class IV–D, Class IV–C, Class IV–B, Class IV–A (not considered in time of war), Class III–A, Class II–B, Class II–A, or Class I–H.

(b) The Department of Justice shall thereupon make an inquiry and hold a hear-

ing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the board of appeal (1) that if the registrant is inducted into the land or naval forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be assigned to work of national importance under civilian direction. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the board of appeal that such objections be not sustained.

(c) Upon receipt of the report of the Department of Justice, the board of appeal shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice.

627.36 *Decision of board of appeal.*— (a) The board of appeal shall classify the registrant, giving consideration to each class in the order in which the local board gives consideration thereto when it classifies a registrant. (*See* part 623.)

(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, however, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in the proper case under the provisions of part 626.

627.27 *Record of decision on appeal.*— (a) When the board of appeal makes its

classification, it shall record its decision, showing the yes and no vote, upon the Selective Service Questionnaire (Form 40) and in the Docket Book of Board of Appeal (Form 102). The board of appeal shall then immediately forward the file to the State Director of Selective Service and mark the case "Closed" in the "Remarks" column of the Docket Book of Board of Appeal (Form 102).

(b) The State Director of Selective Service shall review the file to determine whether he desires to appeal to the President. If he determines to take an appeal to the President, he shall place a notice of such appeal in the registrant's file, shall advise the local board of the classification given the registrant by the board of appeal and of the fact that he has appealed to the President from such classification, and shall then forward the file to the Director of Selective Service. If he determines not to take an appeal to the President, he shall forward the file to the proper local board. In either event the board of appeal classification, together with the yes and no vote, and the action taken by the State Director of Selective Service shall be entered in the State Docket Book of Appeals (Form 104).

(c) When the State Director of Selective Service has advised the local board that he has appealed to the President, the local board shall mail the registrant, the government appeal agent, and the person who took the appeal to the board of appeal, if other than the registrant or the government appeal agent, either a Notice of Classification (Form 57) or a Notice of Continuance of Classification (Form 58), whichever is applicable, writing in on such form the

words: "The State Director of Selective Service has appealed the board of appeal classification to the President."

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627.41. *Appeal stays induction.*—The local board shall not issue an order for a registrant to report for induction either during the period afforded him to take an appeal to the board of appeal or during the time such an appeal is pending. Any such order to report for induction which has been issued shall be ineffective and shall be canceled by the local board.

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627.61 * * *

(b) Any time before an Order to Report for Induction (Form 150) has been mailed to a registrant, the government appeal agent, if he deems it to be in the national interest or necessary to avoid an injustice, may prepare and place in the registrant's file a recommendation that the State Director of Selective Service either request the board of appeal to reconsider its determination or appeal to the President. The registrant's file shall then be forwarded to the State Director of Selective Service. As soon as the State Director of Selective Service has acted upon the government appeal agent's request he shall advise the local board and, if he determines neither to request the board of appeal to reconsider its determination nor to appeal to the President, he shall return the file to the local board.

* * * * *

628.1 *Who may appeal to the President from any determination of a board of appeal.* When either the State Director of

Selective Service or the Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may appeal to the President from any determination of a board of appeal. He may take such an appeal at any time.

628.2 *Appeals on ground of dependency only.* (a) The registrant or any person who claims to be a dependent of the registrant, at any time within 10 days after the mailing by the local board of the Notice of Classification (Form 57) or the Notice of Continuance of Classification (Form 58), may appeal from the classification of the registrant by the board of appeals provided (1) the appeal is made upon the grounds of dependency only; (2) the registrant was classified by the board of appeal in either Class I–A, Class I–A–O, Class I–B, Class I–B–O, Class IV–E, or Class IV–E–LS; and (3) one or more members of the board of appeal dissented from such classification. The local board may permit any person who is entitled to appeal under this paragraph to do so, even though the 10-day period herein provided for appeal has elapsed, if it is satisfied that the failure of such person to appeal within the 10-day period was due to a lack of understanding of the right of appeal or to some cause beyond the control of such person.

628.4 *Procedure on appeal to the President.* (a) When an appeal to the President is taken, the local board shall (1) notify the registrant that such an appeal has been taken, unless he is the person who took the appeal; (2) forward the entire file to the State Director of Selective Service; and (3) enter on the Classification

Record (Form 100) the date the file is forwarded. The local board shall not place in the file any statement or expression of opinion concerning the information in the registrant's file or the reasons for its decision.

(b) The State Director of Selective Service shall check the file to be sure that all procedural requirements have been properly complied with and, if he discovers any procedural defects, he shall return the file for its correction. If any information has been placed in the file which was not considered by the local board in making the classification from which the appeal to the President is taken, the State Director of Selective Service shall review such information and, if he is of the opinion that such information, if true, would justify a different classification of the registrant, he shall return the file to the local board with instructions to reopen the registrant's classification and classify the registrant anew.

(c) When the State Director of Selective Service has complied with the provisions of (b) above, he shall, unless the file is returned to the local board, forward the file to the Director of Selective Service. The State Director of Selective Service, unless he himself is the appealing party, shall not place in the file any statement or expression of opinion concerning the information in the registrant's file.

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628.6 *Procedure of local board when appeal to the President is returned.* When the file of the registrant is received by the local board, it shall:

(1) If the classification of the registrant by the board of appeal has been affirmed,

mail a Notice of Continuance of Classification (Form 58) to the registrant and a Classification Advice (Form 59) to the person making the appeal, if other than the registrant;

(2) If the classification of the registrant by the board of appeal has been changed and the registrant has been placed in a different class, mail a Notice of Classification (Form 57) to the registrant and a Classification Advice (Form 59) to the person making the appeal, if other than the registrant;

(3) Enter in the Classification Record (Form 100) the date of the mailing of such notice and advice; and

(4) If the classification of the registrant by the board of appeal has been changed, enter the new classification in the Classification Record (Form 100) and, with red ink, draw a line through the board of appeal classification.

628.7 *Appeal to the President stays induction.* A registrant shall not be inducted during the time an appeal to the President is pending.

APPENDIX C

As summarized in the Brief for the United States, pp. 37–44, in *Falbo* v. *United States*, No. 73, 1943 Term, the Selective process at the time that petitioner was being classified was as follows:

The process of selection begins with registration and ends with acceptance by the armed forces or for work of national importance. The initial step after registration is the registrant's receipt (if he is between the ages of 18 and 45), filling out, and return to the local board of the questionnaire. The registrant is entitled to present all written information which he believes necessary to assist the local board in determining his classification; this information is to be included in or attached to the questionnaire. (Reg. 621.4.) There is a space on the questionnaire in which a registrant may make his claim to be a conscientious objector; if he so claims, he is furnished a special form to substantiate his claim, and this form becomes a part of the questionnaire (Reg. 621.3).

Upon receipt of the questionnaire, the local board proceeds to classify the registrant solely upon the basis of the written information in his file (Reg. 623.1, 623.2). Unless placed in certain deferred classes, the registrant is then physically examined by local board examining physicians. A registrant claiming to be a conscientious objector

(Class IV–E or I–A–O)[1] is in any event examined at this point (Reg. 623.21, 623.31), and his claim is not passed upon unless it appears upon this preliminary physical examination that he is physically fit for service (Reg. 623.51 (c)).

Thereafter, the registrant receives a notice of the classification by the local board (Reg. 623.61). Upon receipt of such notice, the registrant may, upon written request within ten days, ask for an appearance before the local board (Reg. 625.1). If request is made, time for appeal is stayed (Reg. 625.2 (e)), and the local board must send a notice of time and place for the appearance, at which the registrant may submit such additional information and make such additional presentation as he wishes. All such information must be reduced to writing and placed in the registrant's file (Reg. 625.2).

If the registrant's requested classification is denied, he may appeal (Reg. 625.2 (e), 627.2 (a)). In addition, the Director of Selective Service, the State Director of Selective Service, or the government appeal agent may also appeal from the local board determination (Reg. 627.1 (a), 627.2 (a)). The appeal results in a *de novo* consideration by the appeal board. Appeal is taken by filing a written notice, or by signing the "Appeal to Board of Appeal" upon the questionaire (Reg. 627.11); the registrant may attach to his appeal a statement of the respects in which he believes the local board erred, may

[1] A registrant found to have conscientious objections to all military service is placed in Class IV–E; one found to object to combatant service only is classified I–A–O. Regs. 622.12, 622.51.

direct attention to any information in his file which he believes the local board failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which that board failed or refused to include in his file (Reg. 627.12). If the information is not sufficient to enable the appeal board to determine the registrant's classification, the file is returned to the local board with proper instructions (Reg. 627.23). In transmitting the file to the appeal board the local board "should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision" (Reg. 627.13) (a)). The taking of appeal automatically stays induction (Reg. 627.41).

A special procedure upon appeal is provided by Section 5 (g) of the Act (Appendix A, *infra*, pp. 59–60) and by Reg. 627.25 for persons who assert conscientious objections. The appeal board makes a preliminary examination of the file to determine whether the registrant should be placed in a deferred or exempted class other than the conscientious objector class. If it decides that he should not be so placed, the board of appeal must transmit the file to the local United States Attorney. The Department of Justice must then make an inquiry and hold a hearing, of which the registrant is given notice, on the character and good faith of the registrant's conscientious objections. Upon the basis of such inquiry, the Department submits a report and its recommendations to the appeal board. Under Section 5 (g) of the Act, as well as the regulations

(627.25 (c)), the appeal board must give consideration to, but is not bound by, the recommendation of the Department of Justice.

The appeal board then makes its classification and returns the case to the local board (Reg. 627.26, 627.27), which notifies the registrant of the appeal board's action (Reg. 627.31). The decision of the appeal board may, however, be subject to further appeal upon certain conditions. Appeals as of right to the President may now be taken by the registrant in any case where he is classified as available for military service (I–A) or as a conscientious objector (I–A–O or IV–E) and one or more members of the board of appeal dissented from the classification (Reg. 628). In addition, in any other case, the State Director of Selective Service or the Director of Selective Service may appeal, if either "deems it to be in the national interest or necessary to avoid an injustice" (Reg. 628.1). If such appeal is taken, the registrant is notified; he is also notified of the President's decision (Reg. 628.4 (a), 628.6). Appeal to the President stays induction (Reg. 628.7).

If the registrant is classified I–A, and the local board determines that he shall report, he is sent an Order to Report for Induction (Reg. 633.1). Section 3 of the Act, however, expressly provides that—

> * * * no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined: * * *

Accordingly, the registrant is, upon reporting at the induction station, subjected to a final physical and mental examination. Only the selected men who are found acceptable in such examination are inducted into the armed forces (Reg. 633.9). Upon receiving notice that a registrant has been found acceptable and has been inducted, the local board places him in I–C; if he is not accepted because of unfitness, he is placed in IV–F (Reg. 633.13; see Reg. 633.10 (c)). It is not until after this step is taken that the Selective Service classification is complete.

If the registrant is classified IV–E as a conscientious objector to both combatant and noncombatant military service the procedure for assignment to work of national importance is somewhat different. In that case, when his order number is reached in the process of selecting I–A and I–A–O registrants to report for induction into the armed forces, the registrant is summoned for a final type physical examination at the induction station in the same manner as that conducted for other selected men (Reg. 651.1–651.8). If the report of the examination indicates that he is physically and mentally qualified for service, the local board notifies the Director of Selective Service that he is acceptable for work of national importance (Reg. 651.10 (a), 652.1). The Director then assigns the registrant to a camp and upon receipt of such assignment the local board issues an order to the registrant to report for work of national importance (Reg. 652.2, 652.11) and it is his duty to comply with the order (Reg. 652.11).

APPENDIX D

Executive Order 8619 (5 F. R. 5256) provides as follows:

EXECUTIVE ORDER

DESIGNATING THE DIRECTOR OF SELECTIVE SERVICE TO PERFORM CERTAIN FUNCTIONS AND DUTIES UNDER THE SELECTIVE TRAINING AND SERVICE ACT OF 1940

Under and by virtue of the authority vested in me by the Selective Training and Service Act of 1940 (Public No. 783, 76th Congress), the Director of Selective Service is hereby designated, authorized, and empowered to perform all of the functions and duties vested in the President by the said Act that relate to appeals from the determinations of boards of appeal. The provisions of the Selective Service Regulations relating to such appeals are modified accordingly.

FRANKLIN D ROOSEVELT

THE WHITE HOUSE
December 23, 1940.

APPENDIX E

The Burke-Wadsworth bill (S. 4164) as introduced by Senator Burke on June 20, 1940, provided in pertinent part as follows:

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SEC. 4. (a) Every male citizen, wherever resident, and every male alien residing in the United States or its possessions who has declared his intention to become a citizen, between the ages of twenty-one and forty-five, except those excepted herein from registration, shall be liable for training and service in the land and naval forces of the United States. The President, pursuant to his authority under the Constitution as Chief Executive and as Commander in Chief of the Army and Navy, is directed, as soon as possible, to select for training and service in the manner herein provided, and to induct into the land and naval forces of the United States, such number of men as in his judgment, whether a state of war exists or not, are required in the national interest for such forces. The President is authorized to assign men selected for training and service to camps or units of the land and naval forces of the United States, including the National Guard, if it shall be ordered into the national service.

* * * * *

SEC. 7. * * * (c) The President shall, under such regulations as he may prescribe, defer training and service in the land and naval forces of the United States of those

men whose employment in industry, agriculture, or other occupations or employment or whose work in engineering, chemistry, physics, medicine, or dentistry are found to be necessary to the maintenance of the national health, safety, or interest, and regular or duly ordained ministers of religion, in the regular discharge of their ministerial duties. The determination of each deferment of training and service shall be made with regard to the status of the individual and shall not be made by deferring the training and service of individuals by occupational groups without regard to the status of the individual therein. The President is also directed under such regulations as he may prescribe to defer the training and service in the land and naval forces of those men in a status with respect to persons dependent upon them for support which renders their deferment advisable; and those found to be physically, mentally, or morally deficient. No deferment from training and service shall continue after the cause therefor ceases to exist.

(d) Nothing contained in this Act shall be construed to require or compel any person to be subject to training or service in a combatant capacity in the land and naval forces of the United States who is found to be a member of any well recognized religious sect whose creed or principles forbids its members to participate in war in any form, if the conscientious holding of such belief by such person shall be established under such regulations as the President may prescribe; but no such person shall be relieved from training or

service in such capacity as the President may declare to be noncombatant.

* * * * *

SEC. 11. (a) The President is authorized—

(i) to prescribe the necessary regulations to carry this Act into effect;

(ii) to create and establish a selective service system, to provide for the classification of registered men on the basis of availability for service and training and to establish local boards and such other agencies, including agencies of appeal, as he may deem necessary to carry the provisions of this Act into effect;

(iii) to appoint and fix the compensation of a Director of Selective Service, who shall be directly responsible to him and to appoint and fix the compensation of such officers, agents, and employees as he may deem necessary to carry out the provisions of this Act;

(iv) to utilize the services of any or all departments and any and all officers or agents of the United States and of the several States, Territories, and the District of Columbia and subdivisions thereof in the execution of this Act and to require of each the performance of such duties as he directs; * * *

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